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Legal Officers Section
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POLICE CIVIL LIABILITY UPDATE

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Municipal and Supervisory

Brown v. Bryan County, Oklahoma, 219 F.3d 450 (5th Cir. 2000)

Todd and Jill Brown were driving their pickup truck from Texas into Oklahoma in the early morning hours when they noticed a police roadblock. Todd decided to turn around, and executed a 180° turn, which drew the attention of the officers who engaged the Browns in a pursuit. Burns, a reserve officer, pulled Mrs. Brown from the vehicle, spun her to the ground, applying an arm bar hold. Mrs. Brown suffered severe knee injuries. Burns, who was 21 years old, had been on the force for a matter of weeks, had no experience in law enforcement and his educational background consisted of a few semesters of college. It appears as though Burns received no formal training and his testimony regarding his LETN training and ride-a-longs was questionable. The sheriff testified that the County did not train officers itself and there were no funds to train personnel. The practice had been to hire individuals for full-time positions who had already received State mandated training. The county also failed to provide formal supervision for its reserve officers. Moore, the full-time officer driving the cruiser in which Burns was a passenger, acknowledged he had no explicit instructions about his responsibilities to supervise a reserve deputy. The county's own expert testified that such supervision of an inexperienced, untrained officer is required and that a

reasonable police chief would have provided these guidelines to its regular and reserve deputies.

The jury awarded Jill Brown extensive damages on her claim, finding that Bryan County could be held liable for the single decision not to train Burns before placing him on the street to make arrests. The sheriff's "awareness of Burns' youth, inexperience, personal background, and on-going arrest activities while with the Department, along with the highly predictable risk of injury from the improper use of force by an untrained officer, provided sufficient notice to the sheriff of the need to train Burns so as to make his failure to require training a conscious decision."

Although there were restrictions on Burns, prohibiting him from carrying a gun or driving a car, they allowed him to make arrests thereby knowing that Burns would be engaging in conduct with the potential for harm that required training.

Gros v. City of Grand Prairie, 209 F.3d 431 (5th Cir. 2000)

The plaintiffs, two women, claim that Rogers sexually assaulted them during two separate traffic stops. In reviewing the officer's record in his prior department it was found that he used excessive force, was determined by a psychologist to be inflexible, defensive, and unwilling to take direction; received a letter of reprimand for insubordination, a complaint for being harassing and overbearing during a traffic stop; was threatening and unprofessional; drew a weapon during a traffic stop; was unable to take criticism; aggravated situations, and other similar complaints but no allegations of sexual misconduct. Plaintiff's claims failed on the improper hiring, failure to train and failure to properly supervise allegations because there was no strong causal connection between the officer's background and the constitutional harm suffered.

Semple v. City of Moundsville, 195 F.3d 708 (4th Cir. 1999)

Semple and Mr. Suarez had been involved in a long-term relationship and had two children. From January 1989 to July 1994, officers responded to numerous requests for assistance and there were a number of arrests and protective orders issued. On August 6, 1994, Ms. Semple went to retrieve some possessions from an apartment she had abandoned weeks before. She arrived with her daughter, her brother who was armed with a handgun and a male friend. At 1:30 p.m. she notified the police that Suarez had vandalized the apartment but did not request assistance. A few minutes later, her daughter called and Ms. Semple picked up the phone advising police that the girl had pressed the redial button and everything was fine. At 1:43 Ms. Semple made a frantic phone call informing police that Suarez was in the home. Police arrived three minutes later to find Suarez had shot Ms. Semple, her brother and her friend and fatally shot himself.

The undisputed facts are that the police did not serve a temporary protective order as soon as plaintiffs say they should have; they did not advise Ms. Semple on every separate occasion of her victim's rights; and they did not physically respond to some of Ms. Semple's

contacts about Suarez' behavior. Plaintiff also complained that the police did not seek revocation of Suarez' bail and they either saw him talking to Ms. Semple or heard that he had spoken to her following the issuance of the criminal warrant issued on July 7th. The court found that none of these acts, although they may be negligent, were performed in a manner approaching intentional conduct or conduct so reckless that intent might be inferred.

The plaintiff claimed that the department failed to properly train its officers in the implementation of its written policy and that the customary police practice was to minimize and trivialize domestic violence. To support a failure to train claim the plaintiffs must establish a direct causal connection between specific deficiencies and a specific injury. In this case the plaintiff failed to point to any specific deficiency in the police training. The most that they could possibly prove is that there may have been a general ineffectiveness in training. The court did not address whether there was any general ineffectiveness.

Investigative Detention

Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000)

Officers, for what would appear to be contrived reasons, stopped two black and one white high school student. They were taken out of the car at gunpoint, patted down and their car was searched. While the black teens were asked questions about what they were doing the white teen was asked questions with regard to his alleged friendship with the blacks.

The Stop: The officers claimed that the boys made a sudden turn into a gas station, looked nervous and were traveling in a high crime area known for gang activity. The court recognized that at times wholly innocent acts, when taken together, may give rise to reasonable suspicion. If the kinds of purely innocent acts here serve as reasonable suspicion, any group of youths would be left vulnerable to being stopped at the whim of the police.

Car search: Officers' counsel argued at trial that the search was conducted to look for contraband. Even if the officers had reasonable suspicion to believe the youths might have a weapon in the vehicle a search for evidence of a crime was not justified under either *Long* or *Terry*.

Excessive Force: The pat-down, which included the grabbing, pulling and squeezing of the boys' testicles was sufficient to support an excessive force claim.

Racial Bias: Evidence of racial bias was relevant first, to explain why the officers stopped the boys without reasonable suspicion and why they used excessive force; second, to demonstrate why the plaintiff's testimony, not the officers', should be deemed credible, and finally, as proof that the defendants' conduct was malicious, wanton or oppressive or in reckless disregard of the plaintiffs' rights necessary to justify punitive damages.

McKelvie v Cooper, 190 F.3d 58 (2nd Cir. 1999)

Narcotics officers executed a search warrant at a bar occupied by 19 persons. They entered with guns drawn ordering the patrons to the floor. No persons were named in the warrant. The officers frisked the bar patrons and a police dog sniffed and stepped on the plaintiff's crotch. Plaintiff then claimed that someone groped his penis, testicles and anus by poking a finger through his pants. The search took approximately 50 minutes, four people were arrested for possession of narcotics and narcotics were found in other areas of the premises.

Although plaintiff did not challenge the initial detention and frisk the court questioned the constitutionality of the officer's actions under *Ybarra v Illinois*.

The court found that the continued detention of the patrons during the course of the search might have also been unconstitutional. Any safety concern that may have justified the initial detention or frisk was satisfied upon completion of the initial frisk. The fact that the patrons were kept in the bar suggests that the police were hoping to find drugs on them despite the fact that the warrant provided only for the search of the premises.

There was also a question with regard to the intrusiveness of the over-the-clothing examination of the plaintiff. The question remaining for the jury was whether the dog was alerted to drugs or sniffed plaintiff as a matter of common canine curiosity.

Watkins v. City of Southfield, 221 F.3d 883 (6th Cir. 2000)

Officers had reasonable suspicion to stop two young males driving between 4:00 and 5:00 in the morning at half the speed limit through a high crime area. When the suspect vehicle failed to pull over when signaled to do so, several cruisers converged stopping plaintiff. Pulling the plaintiff from the car, they handcuffed and patted him down, and placed him in back of the squad car resulting in plaintiff hitting his head on the doorframe. The court found the stop to be lawful and that the officers did not use excessive force.

Choi v. Gaston, 220 F.3d 1010 (9th Cir. 2000)

At 8:59 p.m. a man mortally wounded a highway patrol officer who stole his service revolver and his vehicle. At 9:10 p.m. the named suspect was described as a male Vietnamese teenager, 5 foot 10 inches, wearing a white tee shirt and black pants. At 9:41 p.m. officers found the police vehicle in a Ford dealership driveway and observed a man wearing a white tee shirt and black pants running from the area. A few minutes later the plaintiff and a Hispanic male were seen standing about 1/5 of a mile from the dealership. Plaintiff was a 32-year-old Korean male, 5 foot 7 inches, weighing 145 lbs, wearing a striped white shirt, blue jeans and white athletic shoes. Two officers took him to the ground at gunpoint.

The court ruled that there was an issue of fact as to whether the police had enough evidence to justify a *Terry* stop. The stopping officers indicated they had been informed over the radio that the suspect was "oriental". In fact, the information was much more specific. The court noted that the officers knew that the plaintiff's description did not match that of the suspect and in essence, were stopping the plaintiff because he was "oriental", a classification

embracing 2 billion persons. Criticizing such stereo-typing, the court stated that although they could not hold the officers accountable for their convention-bound vision, they could expect more of police moving in a community of many ethnicities. Although a custom of treating "all Asians" alike would be intolerable, the court did not find that the record established a city-sponsored custom of such careless stereotyping.

Brown v. City of Oneonta, 195 F.3d 111 (2nd Cir. 1999)

A 77 year-old woman fought off a young black man cutting his hand with a knife. Approximately 450 African Americans lived in this community, which was comprised of approximately 10,000 residents and 7,500 students attending a state university. The police obtained a list of all black students. After attempt to question them, officers conducted a sweep, stopping and questioning more than 200 non-white persons. Plaintiffs contend that the defendants utilized an express racial classification by stopping and questioning plaintiffs solely on their race. The court denied the equal protection claim finding that the persons stopped fit the description of a suspect based not only on race but also on gender and age, as well as the possibility of a cut on a hand.

The court also evaluated a number of individual claims to determine whether the plaintiffs had in fact been seized. The court distinguished between seizures and encounters of brief duration. For example, merely walking up to someone and having him identify himself and show his hands could be an encounter of brief duration, whereas stopping a vehicle or specifically communicating that someone is not free to leave would constitute a seizure.

Thomas v. Dickel, 213 F.3d 1023 (8th Cir. 2000)

A trial court judge found that an officer was untruthful when he testified that he was able to see a shoulder harness hanging from the roof of the car when the harness was attached to the seat and therefore impossible to see. The court's dismissal of seat-belt charges was followed by a voluntary dismissal of the possession of marijuana charge. Still the appeals court ruled the officers acted on reasonable suspicion that plaintiffs were not secured by seatbelts when they stopped their vehicle. The officers followed the plaintiffs' car for a couple of blocks and could not see a shoulder harness pulled down across the plaintiffs' bodies. Dissenting opinion strongly disagrees with the majority that found that the alleged officers' untruthfulness was irrelevant to the issue of reasonable suspicion and argued the policy implications of such a finding. "When a law enforcement officer gives a false explanation for exercising his or her police power, the American public will justifiably perceive it as an abuse of power, and that perception will undermine the authority and credibility of law officers everywhere."

Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999)

Indianapolis police set up roadblocks 6 times in a 4-month period to catch drug offenders. Approximately 5% of the stops resulted in successful drug hits and another 4% in arrests for other offenses. The court held that police roadblocks intending to catch drug offenders violated the 4th Amendment. It recognized four types of valid roadblocks (1) to catch a

specific fleeing criminal; (2) to prevent a serious crime (e.g. unknown persons coming to bomb a building); (3) regulatory searches to protect a certain activity; and (4) prevention of illegal importation of persons or goods.
The court did suggest that if the stop and seizure were for one of the above purposes and drugs happened to be found that might be considered lawful.

The court also suggested that given the high percentage of drug "hits" the use of drugs in these areas seem to be of epidemic proportions which might justify the roadblock under the second exception, however, this was not argued.

Excessive Force

Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000)

Undercover officers working in a high crime area observed a male standing in the parking lot of a market holding a long gun, at port arms, near a gray automobile, which blocked the businesses' entrance. Believing a robbery was in progress, they approached in their unmarked cruiser after calling for back up. Upon ordering the man to drop the weapon, he ordered them to drop theirs. The officers claim the plaintiff fired first, resulting in a gun battle during which one of the officers was wounded. The man with the gun, Claybrook, was killed, and his daughter-in-law, who was sitting in the car, was shot in the back. Claybrook was actually acting as a security guard for his daughter-in-law, Quintana, who worked in the market.

Summary judgment was granted to defendants on Quintana's claims. The court applied the "shock the conscience test", because she was not the object of the officer's use of force.

"…public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain and restore discipline.""

Since the officers did not even know she was in the car, they could not have been acting maliciously and sadistically toward that unknown individual.

Plaintiffs contended that the officers wrongfully incited the incident. The court noted that almost all police use of force incidents begin with the decision of police to help, arrest or inquire. If officers decide to do nothing, then no force would be used.

"In this sense, the police officer always causes the trouble. But it is the trouble the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing."

Jackson v. Sauls, 206 F.3d 1156 (10th Cir. 2000)

Defendant plainclothes officers observed plaintiffs, four young black males pull into a motorcycle shop in what they believed was a stolen car. While checking out the vehicles, the

plaintiffs and shop employees exited the shop. Observing one of the plainclothes officers with a gun and believing they were about to be robbed a shop employee drew his gun resulting in a gun battle.

Damages and Causation

Assuming that the stop was illegal, would the shooting victims be entitled to damages on the use of force claim? Under Section 1983 defendants are, as in common law tort suits, responsible for the natural and foreseeable consequences of their actions. The court agreed that a jury issue remained, cautioning that police officers cannot foresee all conduct occurring after a stop or arrest even if illegal. For example, when a uniformed officer, or an undercover officer identifies himself as a policeman, and draws his gun even during an illegal stop or arrest, civilians do not normally begin shooting. In such a situation it would not be reasonably foreseeable that a shooting would occur. However, under plaintiffs' version, a jury could find that it was reasonably foreseeable given the defendants' dress, actions and failure to identify themselves, that the occupants of the shop may have believed this was an armed robbery and therefore, the discharge of firearms would be foreseeable.

Excessive Force During Stop Period

The court concluded that if it is determined that the stop was illegal then any excessive use of force claim would be subsumed in the illegal stop or arrest claim because if a stop or arrest were illegal, there would be no basis for any threat or use of force.

If the stop was legal the excessive use of force must be dealt with separately. The right to make an investigatory stop carries with it the right to use some degree of physical coercion or threat. An officer's drawing of a weapon and ordering a person to stop and lie on the ground does not necessarily constitute excessive force during an investigatory stop. The court ruled that under the defendants' version of events a reasonable police officer would not have known that drawing his gun and ordering plaintiffs to lie on the ground violated plaintiffs' clearly established rights.

Deadly Force

The court found that the officer's actions were objectively reasonable, as their firing of weapons was in response to a clearly life threatening situation.

Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000)

Police received a 911 call requesting transport of Hainze who allegedly was suicidal, under the influence of alcohol and antidepressants, carrying a knife and threatening to commit suicide. Officers arrived at a convenience store and observed Hainze holding a knife and not wearing shoes despite the cold temperature. The officer drew his weapon and ordered Hainze away from a pickup truck he was standing next to. Hainze responded with profanities and began walking toward the officer. Two other officers also drew their weapons. Officer Allison twice ordered Hainze to stop, but he continued to advance within

4-6 feet at which point Allison fired two shots into his chest. Approximately 20 seconds elapsed from the time the officers arrived till the shooting.

Hainze was convicted of aggravated assault. In addition to claims against the officers he also brought official capacity claims for failing to adopt or enforce policies to adequately handle individuals who are mentally ill in a crisis situations, as well as failure to establish a policy or train deputies to protect the well being of mentally ill individuals. Hainze alleged that, "Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use less than deadly force, and never attempted to create any opportunities for the foregoing to occur." The court rejected these allegations.

…"(We hold that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officer's to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.)"

See also, Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999).

Bates v. Chesterfield County, Virginia, 216 F.3d 367 (4th Cir 2000)

Plaintiff, an autistic teenager, was stopped by an officer who had reasonable suspicion to believe that he may have trespassed and might have been intoxicated on alcohol or drugs. When the plaintiff physically resisted, the officers attempted to control him and called for assistance. During the subsequent struggle plaintiff bit, spit at, kicked and scratched the officers.

The court found that the initial stop was based on adequate reasonable suspicion and that the use of force from start to finish was reasonable under the *Graham* analysis. Plaintiff assaulted the police officers, was an immediate threat to their safety and was actively resisting arrest. Although plaintiff was fiercely resisting the officers, they did not pepper spray or use their batons against him and he suffered minimal injury.

Plaintiff also claimed that the officers' violated ADA, in that they should have been aware of his autism and should have taken this condition into account when interacting with him. The court refused to undertake an independent ADA inquiry following their 4th Amendment analysis that the force used by the officers was reasonable in light of all the circumstances including their use of force after they learned of the plaintiff's autism. "Knowledge of a persons disability simply cannot foreclose officers from protecting

themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual."

Green v. Montgomery, 219 F.3d 52 (2nd Cir. 2000)

Two officers, on foot, attempted to stop a stolen jeep driven by the 15-year old plaintiff. The officers contend that as the jeep drove at one of them, they shot the plaintiff. Plaintiff contended that they fired at him as the jeep was rolling to a stop. Plaintiff was indicted for attempted murder and assault in the first degree, reckless endangerment, grand larceny and possession of stolen property. At trial, plaintiff was found not guilty of the attempted murder, assault and grand larceny charges, but was found guilty on the reckless endangerment and criminal possession charges. Because he was adjudicated as a juvenile there was a question as to whether the record was sealed and collateral estoppel could prevent him from litigating his excessive force and malicious prosecution claims. Since reckless endangerment involves conduct creating a grave risk of death to another, the use of deadly force to protect another from such risk would be justified. If the records were sealed, the issue could be litigated and a jury believing the plaintiff could find that the use of deadly force was unreasonable.

A plaintiff charged with crimes of varying degrees of seriousness, and convicted on the lesser charges, may nonetheless sue for malicious prosecution on the more serious claims that were terminated in his favor. Although there is a presumption of probable cause following an indictment, the presumption may be overcome by evidence that the indictment was the product of fraud, perjury, the suppression of evidence by the police, or that the police conduct was taken in bad faith. If the plaintiff was allowed to re-litigate this issue he may prevail, if the jury determines that the officers charged him with more serious crimes to protect themselves from liability for excessive force.

Robinson v. Solano County, 218 F.3d 1030 (9th Cir. 2000)

Plaintiff, a sixty-four-year old African American retired police officer, shot two dogs attacking his livestock. His neighbor, the owner of the dogs, called the police reporting that a man carrying a shotgun had just shot two dogs and was in the middle of the street. When six police vehicles pulled up outside his home he approached without the shotgun to explain the incident. Two officers placed guns to his head. He was then handcuffed and placed in a cruiser while the officers conducted their investigation. Plaintiff claims he approached calmly and was never searched but the officers claim he was agitated and was searched. There was no dispute that the officers never discovered the utility knife attached to his belt. The court found that holding a gun to a suspect's head may constitute excessive force and remanded the case for retrial.

Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121 (9th Cir. 2000)

This case explores the use of pepper spray to remove non-violent demonstrators. The court determined that:

(1) the nature and quality of the intrusion is great since protestors suffered excruciating pain when OC was applied to their eyelids with a Q-tip and even more so when it was sprayed into their faces;

(2) other pain compliance techniques may be preferable since the pain applied can be immediately stopped whereas with pepper spray the individual suffers immediate and searing pain that continues until the spray is flushed out thoroughly with water.

The district court erred in determining that the government's interest at stake involved a need to quickly remove the trespassers and in preventing organized lawlessness by a large group of protestors. In this case the use of pepper spray actually took more time than alternatives, and very few of the protestors were in a position requiring immediate removal.

1) There was no risk to the safety of officers or others and no need to make a split second decision and the crime was not severe;

2) given the time to determine how to remove the protestors, the availability of alternative actions was relevant to the reasonableness of the officers' use of force; and

3) arguments and statements made by officers in an attempt to justify the need to use pepper spray were contrary to fact.

Sappington v. Bartee, 195 F.3d 234 (5th Cir. 1999)

Plaintiff alleged that Officer Garcia and other officers approached him while he was sitting on the side of the road with his wife. The officers took him to jail where they pepper sprayed and beat him. The Court held that plaintiff's excessive force claims were barred by Heck v. Humphrey. Plaintiff was convicted of aggravated assault, which requires proof that he caused serious bodily injury. Therefore, Garcia was justified in using force up to and including deadly force. The criminal conviction necessarily implies that Garcia did not use excessive force.

Katz v. United States, 194 F.3d 962 (9th Cir. 1999)

Katz, a sixty-year old animal rights activist wearing a knee-high leg brace for a broken foot, was protesting at Presidio Army Base during a speech given by Vice President Gore. When Katz, standing behind the fence, began to unfurl a 4' x 3' banner stating, "Please keep animal torture out of our national parks", a military police officer grabbed him from behind, and then aided by a Sergeant, took Katz by the arms walking him to a van. He was shoved in the van and left there for approximately 20 minutes during which another demonstrator was placed in the van. Defendant searched and handcuffed Katz and the other demonstrator. Katz was released without being charged.

The qualified immunity analysis is the same for Bivens' actions against federal officials, as it is for claims against state officials under 42 U.S.C. Section 1983. Most circuits have held that the inquiry as to whether officers are entitled to qualified immunity for the use of

excessive force is the same as the inquiry on the merits for an excessive force claim. This does not eliminate the availability of qualified immunity when the law governing the officer's conduct was not clearly established at the time of the act. Applying the Graham v. Connor analysis, the court found the defendants were not entitled to qualified immunity. Unfurling a banner at a public event was not a particularly severe crime. An unarmed sixty-year old wearing a leg brace did not pose an immediate threat to the safety of officers or anyone else, and there was a dispute as to whether Katz resisted the arrest.

Neal v. St. Louis County Board of Police Com'rs, 217 F. 3d 955 (8th Cir. 2000)

Plaintiff, Officer Neal, was accidentally shot and killed by defendant, Officer Peterson, during an undercover operation. Plaintiff admitted that Peterson accidentally shot Neal in an attempt to protect him from an individual who had placed a gun to his head. The court found that unless Peterson acted maliciously and sadistically for the very purpose of causing harm, his accidental shooting of Neal did not violate Neal's 14th Amendment rights. The court also rejected plaintiff's arguments of deliberate indifference in failing to follow policies and practices including:

1) Pre-transaction Planning or briefing;

2) use of authorized ammunition;

3) keeping fellow officers in sight during an undercover operation;

4) use of wire to record and monitor conversations between fellow officers and suspects;

5) use of additional officers as backup; and

6) use of bulletproof vest.

The court specifically refused to consider violations of department guidelines allegedly committed 1 ½ hours before the shootout finding that police department guidelines and policies do not create constitutional rights under the substantive of due process clause of the fourteenth amendment.

Miller v. Smith, 220 F.3d 491 (7th Cir. 2000)

Plaintiff, who was mistaken for an armed robbery suspect, claimed officers used excessive force during his detention. The district court dismissed his complaint based on his failure to specify that the state troopers where acting in their individual capacities and his inability to identify the specific officers who allegedly used excessive force against him. The court found that although the plaintiff did not specifically state individual capacity claims, the nature of his complaint obviously was intended as a suit against the officers in their individual capacities, therefore, the eleventh amendment did not bar his complaints. The court also found that if the plaintiff proves his allegations of excessive force it would not be necessary to specifically identify which officers used the force since any officers there could be held

liable for either the use of such force or failure to act to prevent the other officers from violating the plaintiff's civil rights.

Wilson v. Spain, 209 F.3d 713 (8th Cir 2000)

Defendant-officer was sued in an excessive force claim resulting from his entry into plaintiff's cell. Videotape showed Officer Spain pushing the cell door open quickly with both hands. When the door met with resistance, Spain gave a stronger push opening it completely. The videotape shows a solid construction door with narrow slits for an opening. Although Spain might have known that the door could make contact with Wilson, he could not see through the door and had no way of knowing what Wilson was doing or precisely how he was positioned. Therefore, a jury could not reasonably find that Spain's split second decision to push harder against the door was unreasonable. Allegations of statements made earlier by Spain showing that he was angry or threatened Wilson were irrelevant to the question of his objective reasonableness. "The officer's subjective intentions are irrelevant; a pure heart will not make unreasonable acts constitutional, nor will malice turn a reasonable use of force into a violation of the Fourth Amendment." Graham, at 297. The court also described the split in the circuits with regard to the analysis of excessive force complaints beyond the point at which arrest ends and pre-trial detention begins.

Scott v. Tennessee, 205 F.3d 867 (6th Cir. 2000)

Deputy Thompson attempted to stop the Scott vehicle after he saw it erratically race past a stop sign. Plaintiff, Patricia Scott, was a passenger in the vehicle driven by her husband, Robert, who was intoxicated, had recklessly fled from law enforcement authorities in the past, was emotionally agitated after picking his ex-wife up at a narcotics den and was intent on not stopping for the officers because his license had been revoked. Three units chased him at speeds of between 85 and 100 mph for over 20 minutes. He almost collided with one sheriff's vehicle and did collide with Deputy Pierce's vehicle at some point. After Scott crashed into a guardrail, Pierce exited his patrol car, drew his 9 mm, and cautiously approached the Scott vehicle. When the car rapidly accelerated forward Pierce fired 5 bullets toward the driver and 4 rounds at the tires. One shot lodged in Patricia's skull and another in her shoulder.

Although Robert Scott was the specific target the district court presumed that Patricia, was a voluntary cohort of Robert's, who was forcibly removed from the car and handcuffed after the shooting, and therefore was also the intended target of the seizure. Under the Graham analyses Pierce's actions were still deemed to be objectively reasonable. Scott had committed serious life threatening crimes, because of felonious misconduct posed an immediate threat to the safety of officers, as well as, innocent civilians and he was actively resisting arrest. The court rejected the plaintiffs' alternate contention that the officers violated her constitutional rights by initiating the high-speed chase because she had not been injured in the collision.

False Arrest

Oliver v. Woods, 209 F.3d 1179 (10th Cir. 2000)

Plaintiff innocently set off an outdoor alarm at a repair shop while dropping his car off. He refused to identify himself to the responding officer and drove off. Defendant officers stopped and arrested him.

Because the officer had reasonable suspicion to conduct the stop the court found probable cause for the arrest based on a separate Utah Code that pertains to interfering with a detention. Such interference may amount to as little as refusing to perform an act required by a lawful order or refusing to refrain from performing an act that would impede a detention. Even though Officer Woods no longer suspected Oliver of the illegal oil dumping or trespass at the time of the arrest, he could have reasonably believed he had probable cause to arrest Oliver for interfering with the detention by refusing to identify himself and leaving the parking lot. The court also found that Officer Scow was entitled to qualified immunity in his objectively reasonable reliance upon the information communicated to him by Officer Woods.

Birge v. Parish of St. Taminy, 187 F.3d 452 (5th Cir. 1999)

On October 17, 1980, the body of Douglas Freirson was found under a bridge. He had been shot in the abdomen, shoulder and head with a large caliber weapon. There was contradictory evidence with regard to plaintiff, Birge, being with Frierson at the time of the murder. Birge told Detective Hail that he had a Ruger Blackhawk .44 magnum that he had given to Frierson to sell approximately one week before the murder. The next day Detective Hail interviewed the victim's brother who stated that Birge had a .44 caliber weapon and said that he would kill anybody before he would go to jail. Pearson, an acquaintance of Birge and Frierson, confessed that they had been together arguing over money when Birge shot Frierson and threw the gun into Lake Pontchartrain. In 1983, Birge and Pearson were indicted for 2nd degree murder.

Following Birges conviction, Lt. Herman stated that when he asked Hail what had happened to a missing tape recording, Hail opened the trunk of his vehicle and showed him several reports and statements pertaining to the murder investigation. When asked why he had them in his trunk, he allegedly told Herman, "some of this stuff could probably make us lose the case." Following disclosure of this evidence plaintiff was found not guilty in a second trial, brought this action claiming Brady violations for failure to disclose exculpatory evidence. "Because the net effect of the state-suppressed evidence favoring Birge raises a reasonable probability that its disclosure would have produced a different result at the first trial, failure to disclose that evidence violated Birge's constitutional rights." The court found that Lt. Herman's testimony alone was sufficient to pierce the good faith qualified immunity defense raised by Hail, and create a fact issue for trial.

Berg v. County of Allegheny, 219 F.3d 261 (3rd Cir. 2000)

A court clerk's error in transposing two numbers into the computer system led to plaintiff's arrest. When the wrong numbers were entered, all of the identifying information of the

plaintiff appeared on the arrest warrant. When the probation officer requesting the warrant checked the case file he noticed that no warrant for the proper person had been issued and thought for a moment that an erroneous warrant may have been issued, but that no practical way existed to determine if this had been done. The court found that both the clerk who entered the information and the adult probation officer were entitled to qualified immunity; however, the officer executing the warrant was not.

...an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances. Such circumstances include, but are not limited to, other information that the officer possesses or to which he has reasonable access, and whether failing to make an immediate arrest creates a public threat or danger of flight.

The court also found that the county could be held liable. The record contained no evidence for procedures guarding against the clerk's mistake, no double check to insure that warrants were issued in the correct name, nor was there any procedure by which an officer suspecting an erroneous warrant could ascertain whether one, in fact, was issued.

Having employed a design whose slip of a finger could result in wrongful arrest and imprisonment, there remains an issue of fact whether the County was deliberately indifferent to an obvious risk. The County's failure to provide protective measures and fail-safes against the clerk's mistake seems comparable to a failure to equip law enforcement officers with specific tools to handle recurring situations. …when such a simple mistake can so obviously lead to a constitutional violation, we cannot hold that the municipality was not deliberately indifferent to the risk as a matter of law.
The court went on to quote Justice Ginsburg and Justice O'Connor on law enforcement's increasing reliance on computer technology.

Computerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the database." Arizona v. Evans, 514 U.S. at 26… "the police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities. Id, at 17-18.

Miller v. Kennebec County, 219 F.3d 8 (1st Cir. 2000)

On Saturday afternoon, the plaintiff was stopped for driving with an expired inspection sticker. A warrant check disclosed a two-year old outstanding warrant for failure to appear in court to pay a $235.00 fine. The arresting officer drove plaintiff, Ms. Miller, to her home to drop off her six-year old at which time Miller's husband told the officer that the fine had been paid and they had a cancelled check to prove it. Upon arrival at the station the dispatcher told Officer Davis that the warrant required that Ms. Miller be brought immediately before a judge. Instead, the plaintiff was brought to jail where she was strip-searched several times during her three-day stay.

The court found that the officer was not entitled to qualified immunity. They found no ambiguity in the warrant nor could it find as a matter of law, that Davis acted reasonably in executing it. The warrant explicitly told him to bring the defendant immediately before a sitting judge and taking into account the fact that it was not a felony warrant, but a bail warrant for nonpayment of a $235.00 fine, a reasonably competent officer would not execute it by depositing an arrestee in jail for a long weekend stay.

The Court further found potential liability on the part of the county based on the existence of a practice of strip-searching arrestees without regard to whether there was a reasonable suspicion that they concealed weapons or contraband.

Williams v. Heavener, 217 F.3d 529 (7th Cir. 2000)

Plaintiff's claim for a malicious prosecution against fellow police officers who arrested her for obstructing a peace officer failed. The court concluded that the plaintiff was attempting to avoid the two-year statute of limitations on the false arrest claim by recharacterizing it as a malicious prosecution action. Although it is possible for plaintiff to support a claim based on officer's misconduct following an arrest, the plaintiff failed to argue the unlawfulness of the officer's conduct after the arrest including any allegation of false trial testimony.

Kennell v. Gates, 215 F.3d 825 (8th Cir. 2000)

Sharon Kennell was arrested after a routine computer check resulted in an outstanding warrant listed for Deborah Kennell. Because Deborah had used Sharon's name during an arrest process the name Sharon was listed as an alias. The identification section determined that the fingerprints did not match and sent an in-house computer message to the warrant and fugitive section and to the attention of officer Gates who processed plaintiff's arrest. The message was received the day of the arrest after defendant's shift. She worked the next two days but never took action to release plaintiff. The jury apparently did not believe her when she testified that she did not receive the message and returned a verdict of $10,000. The appeals court upheld the verdict stating that the jury is generally permitted to infer that the information sent via a reliable means, such as a postal service or telegram, was received. It was found that the same inference regarding other forms of communication such as facsimiles, electronic mail, and in house computer message systems could be made provided they are accepted as generally reliable and the particular message is properly dispatched.

Smith v. Holtz, 210 F.3d 186 (3rd Cir. 2000)

Following Smith's conviction for the murder of a high school English teacher and her two children the State Supreme Court vacated the murder conviction. Before Smith could be retried he learned that the prosecution had not disclosed certain exculpatory information, which ultimately led to the Pennsylvania Supreme Court prohibiting retrial and ordering Smith's release. One of Smith's defense arguments was that the mother had been killed at the beach. Two grains of sand found on the victim's feet were not disclosed. At civil trial the jury found this evidence not to be material and found in favor of the defendants.

There are three components of a Brady violation: (1) the evidence at issue must be favorable to the accused because it is exculpatory or impeaching; (2) the evidence must be suppressed either willfully or inadvertently; and (3) it must be material. Evidence is material only if there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In this case finding grains of sand is too common; therefore, the evidence was found to not be material.

Atwater v City of Lago Vista, 195 F.3d 242 (5th Cir. 1999)

Officer Turek arrested Gail Atwater for failing to wear her seatbelt, fasten her children in seatbelts, driving without a license and failing to provide proof of insurance. He had stopped her a week before at which time she had all the proper paperwork but her pocketbook was stolen 2 days before this subsequent stop. Officer Turek allegedly turned and screamed at her that they had this conversation before (re: seatbelts) cuffed her and took her to jail. The court found that the officer's actions did not violate plaintiff's constitutional rights in that the officer had probable cause and the arrest was not conducted in an extraordinary manner, unusually harmful to Atwater's privacy interest.

Scott v. Hern, 216 F.3d 897 (10th Cir 2000)

Antiabortion protestor who had been involuntarily committed brought suit alleging that the police officer had included false statements in his report used to seek Scott's involuntary commitment. The court found that even if this was true the officer's report was insignificant compared to other facts supporting Scott's commitment. Further, even if the officer had perjured himself he is absolutely immune from liability under the doctrine of testimonial immunity.

Search & Seizure

Fletcher v. Town of Clinton, 196 F.3d 41 (1st Cir. 1999)

Domestic violence victim allowed her boyfriend back into her home, denied he was there and refused to allow police entry. Officers forced entry and found him hiding in the bathroom.

The officers claim they had exigent circumstances to make a warrantless entry based on their objectively reasonable belief that the plaintiff's safety was in jeopardy. The plaintiff argued that the officers saw no violence, she told them to leave, that her prior complaint had not involved physically violent behavior against Fletcher, and that in the past she had not hesitated to call the police when she felt in danger. The court cites a number of studies with regard to the potential violence in domestic violence situations, especially after legal action is taken against the abusive party. Recognizing that permitting suits against officers, acting in such circumstances would crate the wrong incentive and given the deference to such judgments in domestic violence disputes, the court found that both warrantless entries were lawful.

Lyles v. City of Barling, 181 F.3d 914 (8th Cir. 1999)

Defendant officers were sued for forcing entry into plaintiff's trailer home to arrest him on a warrant for failure to pay child support. The law is clearly established that an arrest warrant carries with it the limited authority to enter the dwelling of a suspect when there is reason to believe the suspect is within. It was undisputed that a neighbor called stating that plaintiff's truck was at this trailer and that two of the officers felt the hood was warm. One officer said he heard movement inside when he knocked and another officer saw a light go off inside the premises. The claims of movement and light were disputed by another officer. Summary judgment was denied based on disputed issues of fact as to whether plaintiff was inside. There were also claims that officers looked in drawe**rs and other places for drugs and pulled the skirting away from the trailer to look underneath.**

Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000)

Officers took custody of two children mistakenly believing that there was an outstanding court order. Officers may be held liable if they remove a child from the custody of a parent without prior judicial authorization if the information they possess at the time of the seizure does not provide reasonable cause to believe the child is in imminent danger of serious bodily injury. Officers may also be held liable if the scope of the intrusion is not reasonably necessary to avert the specific injury. Police also may not seize a child suspected of being abused or neglected without a court order unless they first conduct a reasonable investigation. The nature of the investigation depends in part upon the time element and nature of the allegations.

In this case, officers relied on information received from a DPS worker that a relative of the plaintiffs, who was an institutionalized mental patient, had told of a story of anticipated ritual murder by the father. Ordinarily a close relative's tip that a child is about to be killed might provide reasonable cause to believe an emergency exists justifying a seizure of the child. However, the fact that this bizarre tale came from a relative with a long history of psychiatric disorders and was based on contradictory evidence, the court concluded that a reasonable jury could find that the officers did not have reasonable cause to remove the children without a court order.

Plaintiffs also claimed violations of their Fourteenth and Fourth Amendment rights resulting from invasive vaginal and anal medical examinations made by hospital personnel at the request of police. The "Constitution assures parents that, in the absence of parental consent, [physical examinations] of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances." "Barring a reasonable concern that material physical evidence might dissipate," "or that some urgent medical problem exists requiring immediate attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations."

Nelson v. McMullen, 207 F.3d 1202 (10th Cir. 2000)

Helen McMullen, an officer with the Chickasha Oklahoma Police Department stopped Dorothy Nelson for speeding. The dispatcher notified McMullen that a person with the same name, date of birth and general description with a tattoo on her chest was wanted on a felony warrant in Ohio. Officer Paul Ratzlaff arrived as Ms. Nelson was ordered out of her car. Ms. Nelson informed the officers that she had not been in any trouble and said she did not have any tattoos. The officer explained that the wanted person had a tattoo on her breast and again asked Nelson if she had a tattoo. She again denied having a tattoo and was told by McMullen that she could take her down to the station. Nelson admittedly refused to go to the station while McMullen was insisting that she would need to see her chest in order to confirm that she did not have a tattoo. Without being asked Ms. Nelson grabbed the collar of her oversized tee shirt and pulled her shirt and bra down far enough to expose her breasts, including her nipples to both officers. She did not have a tattoo, was issued a citation and released.

Ms. Nelson claimed she was illegally strip-searched. The court noted that a strip- search is an invasion of personal rights of the highest magnitude. On the other hand, the government interest in confirming Ms. Nelson was not the suspect wanted on the aggravated burglary warrant was also significant. Although the officers were not obligated to simply believe Ms. Nelson and let her go they were also not empowered to conduct a roadside strip search.

What was unusual about this case was that Ms. Nelson chose to pull her tee shirt and bra down exposing her nipples while standing on the shoulder of a public street. Because Ms. Nelson controlled the time, place and manner of the search the court held she could not prove the officers violated her constitutional rights. The court did suggest that the officers could have handled the situation better by trying to confirm other identifying information such as social security number or specific information in the warrant or by having the female officer more discretely observe the area of the tattoo.

Wallace v. Wellborn, 204 F.3d 165 (5th Cir. 2000)

The court affirmed summary judgment on behalf of officers who seized, with a warrant, over 2000 obscene videotapes. As a general rule the Fourth Amendment allows for the seizure of all contraband, instrumentalities and evidence seized with probable cause, however, when First Amendment rights are implicated courts must apply vigorous procedural safeguards. Plaintiff argued that the procedural safeguards include a prior judicial proceeding. Although the Supreme Court has indicated that such a proceeding is usually required, the court found no clear constitutional right to such a hearing in granting the motion for summary judgment.

Ciraolo v. City of New York, 216 F.3d 236 (2nd Cir. 2000)

Plaintiff's constitutional rights were clearly violated when she was strip-searched by corrections department employees following a misdemeanor arrest. The court also discussed the rare instance in which a municipality could be held liable for punitive damages.

Hunter v. Namanny, 219 F.3d 825 (8th Cir. 2000)

An anonymous caller reported lots of traffic coming and staying for short periods at plaintiff, Charmaine Hunter's, home. In two evenings of surveillance only one car was seen driving up and staying for a short time. Upon stopping and searching the vehicle an officer discovered cocaine. In his affidavit the officer stated that the driver told him she had just purchased cocaine from plaintiff. At 2:00 am officers armed with a search warrant knocked and announced their presence. When they received no response they used a battering ram to enter. Drawing their weapons they identified themselves as officers to Hunter, who was asleep on the couch in her underwear. They allowed her to get dressed but refused to allow her to use the toilet even after she explained that she was disabled and taking medication causing her to urinate frequently. She later urinated and defecated on herself. Officers handcuffed her 15-year-old son and led him downstairs while his room was searched. No evidence of criminal conduct was found and the officers left at 3:30 am.

The operator, who had been in possession of the cocaine and was not arrested, testified that she did not buy the cocaine from Hunter but rather received it from an acquaintance at a local convenience store. After replacing this information with the alleged false facts in the warrant and adding information with regard to the two nights of fruitless surveillance, the court found the affidavit clearly lacked probable cause. The discovery of the cocaine in the vehicle leaving Hunter's apartment and the anonymous tip were insufficient to support probable cause.

The court also found that although Hunter's dignity was certainly compromised by the officers refusal to allow her to use the toilet it could not conclude that the constitution required police engaged in a search for drugs to allow residence of the subject property access to a ready means of disposal of such contraband. They also found that the use of force against Hunter's son, in being handcuffed and led downstairs, was diminimus force insufficient to support a finding of a constitutional violation.

Jacobs v. City of Chicago, 215 F. 3d 758 (7th Cir. 2000)

Based on informant information the officers obtained a search warrant for a single-family residence occupied by a 30-year old black male named Troy, who allegedly was selling cocaine out of the premises. The address was actually a 3-apartment dwelling. The officers executed a warrant on the first floor entering the apartment of the building manager who told them no one named Troy lived in the building. They next went to the second floor where they broke down the door, without knocking or announcing, and held a gun to the head of the 60-year old plaintiff, Jacobs. They searched the apartment for over 3 hours finding a small amount of cocaine in a dresser in a bedroom used by his grandchildren.

The court first questioned the validity of the search warrant. The warrant turned out to be overbroad because it does not describe the particular place to be searched and encompassed a separate dwelling unit for which there was no probable cause to authorize a search. It appeared that simple investigative procedures, such as contacting utility or the phone companies would have revealed that the residence was a multi-unit apartment building.

The court also questioned the execution of the warrant. Officers discovering that the place to be searched or being searched is in fact the wrong place must immediately discontinue the search. In this case, it should have been obvious that the building contained 3 apartments as each was accessed through a separate external entrance with the word, apartment and a number next to the door, with separate doorbells and gas meters located outside. In addition they were told by the landlord that there were separate apartments and that Jacobs, not Troy, lived in the second floor apartment. At the moment the officers discovered the defect in the description of the place to be searched they were obligated to cease the search if they could not determine which apartment was the proper subject of the warrant.

The officers claimed that the search was lawful under the exigent circumstance theory as during drug raids there is a strong probability that evidence will be destroyed. The court rejected this argument finding that the fact that the officers were executing a search warrant for narcotics is not sufficient to constitute exigent circumstances. The specific facts indicating that evidence is likely to be destroyed must be present in order for exigent circumstances to exist. Finally, the court found the detention of Jacobs to be illegal and that the holding of a gun to his head amounted to excessive force. The police did not have probable cause to believe that the apartment or Jacobs were connected to the narcotics crime. Even if the officers had been justified in briefly detaining Jacobs to ascertain if he was Troy, the manner in which the seizure is alleged to have occurred by breaking down the door, holding a gun to his head and detaining him for 3 hours, did not appear to be reasonable.

Lalonde v. County of Riverside, 204 F.3d 947(9th Cir. 2000)

Officers responded to a neighbor's noise complaint.

Plaintiff's girlfriend opened the door and when the officers asked if Lalonde was there, he walked into view. He refused to leave the apartment or allow the officers to enter. Officer Moquin testified that Lalonde turned to head toward the interior of the apartment at which point he reached in and tried to grab him. While they struggled on the floor Moquin pepper sprayed Lalonde. Officer Horten forcibly pushed his knee in Lalonde's back while handcuffing him. Lalonde remained on the couch handcuffed with pepper spray burning his face for 20 to 30 minutes.

The court denied qualified immunity finding that the existence of probable cause without more was insufficient to justify the warrantless entry. The Supreme Court stated in Welsh v. Wisconsin that exigencies related to a misdemeanor seldom, if ever, justify a warrantless entry into the home.
The court also denied qualified immunity on the claims regarding kneeing plaintiffs in the back, tight handcuffing and unnecessarily prolonged exposure to pepper spray.

Failure to Protect

Shipp, et al. v. McMahon, et al., 199 F.3d 256 (5th Cir 2000)

Plaintiff, a victim of spousal abuse, was kidnapped and shot by her husband. She claimed officers failed to enforce court orders even when they had contact with her husband.

In response to plaintiffs' equal protection claim, defendants argued that there was no evidence of discriminatory intent. The Court found that although the pleadings did not identify direct evidence of discriminatory intent, plaintiff could rely on circumstantial evidence in proving discriminatory intent. In this case, plaintiff's fact-specific historical account including defendant's failure to respond to the complaints of the parents about the husband, failure to arrest the husband for violations of the TRO and conditions of bail, and the deputy's knowledge of the husband's propensity for violence were sufficient to support an inference of discriminatory intent necessary for an equal protection claim.
Plaintiff also claimed the department's failure to implement policies and training to address domestic violence amounted to a violation of equal protection. The court agreed that Shipp's complaint that the department intentionally adopted policies and customs that afforded less protection to women, victims of domestic violence and other victims, was sufficient to support an equal protection claim. The state may not selectively deny it's protective services to certain disfavored minorities without violations of the equal protection clause. Finally, the court ruled that the officers' failure to arrest the husband knowing of his violent propensities and his violation of the TRO and conditions of bail was not objectively reasonable.

Chavez v. Cady, 207 F.3d 901 (7th Cir. 2000)

A pretrial inmate named Chavez suffered from stomach pains, vomiting and had not had a bowel movement for ten days prior to being taken to a hospital. Although he saw a nurse twice, who misdiagnosed his condition, and was given some medication, some of the nurse's orders were not followed and his repeated demands to be taken to the hospital or see a doctor were denied. In order for a pretrial detainee to prevail on his due process claims alleging inadequate medical care, he must show that the official acted with deliberate indifference to serious medical needs.

Under Farmer v. Brennan, 511 U.S. 825 (1994), plaintiff must show that the officials knew of and disregarded an excessive risk to the inmate's health and safety; the official must be both aware of facts from which the inference could be drawn, that a substantial risk of serious harm exists and he must also draw the inference. In this case, the Court found the officer not to be entitled to summary judgment as they could not hide behind the nurse, and as a matter of law, it could not be said that they did not know that Chavez was seriously ill or that they were not deliberately indifferent.

Williams v. Kelso, 201 F. 3d 1060 (8th Cir. 2000)

Williams was arrested for drunken assault upon his wife and booked at a detention facility on July 22. He appeared to be disoriented, confused and somewhat separated from reality. On July 26 an altercation broke out between Williams and another inmate when Williams experienced hallucinations. He was transported to a medical center, treated and released. Both a psychologist and psychiatrist examined him and instructions were given to isolate

him and check for vital signs. Although his vital signs were never checked, he was viewed throughout the day. Lt. Kelso spoke him to at 5:40 pm. At approximately 5:45 p.m. Kelso returned to Williams' cell to transport him to the detoxification facility but found him unconscious. His death was caused by asphyxiation on toilet paper he lodged in his throat. Plaintiff's burden in proving deliberate indifference under Section 1983 is to demonstrate that he was in serious need of medical attention and that the prison officials actually knew of but deliberately disregarded those needs. In this case the plaintiff was segregated, provided with medication, taken to a hospital when he was injured, and received psychological evaluation and the mere fact that instructions were not followed to check his vital signs did not meet the deliberate indifference test, in fact, at most it could be considered negligent.

Miscellaneous

Miranda

California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 2000)

Santa Monica and Los Angeles police officers' interrogated two murder suspects. After advising them of their *Miranda* rights, some questioning proceeded and both invoked their rights to remain silent and to counsel. The detectives disregarded the invocation of their rights, continued to question them and misinformed the defendants that since they invoked their rights, nothing they said could be used against them in criminal court.

The officers claimed that *Miranda* is not a constitutional right, and even if it is, the right was not clearly established at the time and the defendants could reasonably rely on training materials endorsing questioning "outside *Miranda*". The training apparently involved teaching officers that statements taken outside *Miranda* could be used for impeachment purposes. The court rejected these arguments finding that *Miranda* was a constitutional right that there was no question that a reasonable officer in the defendant's position would know that their actions violated these *Miranda* rights and that relying on training and training materials did not entitle the officers to qualified immunity. Following orders will only insulate officers from liability when reliance is objectively reasonable. In this case the officers should have known that when defendants invoked their rights their questioning should have immediately ceased.

Procedure

Treece v. Hochstetler, 213 F.3d 360 (7th Cir. 2000)

Plaintiff appealed claiming the district court erred in excluding evidence of prior bad acts and in granting the defendant's motion to bifurcate. Describing the four-prong test to determine admissibility of prior bad acts, the court concluded the bad acts in question did

not come close to strongly resembling the pattern of conduct of the offense charged. In confirming the trial court's bifurcation order the court noted the various justifications of bifurcation including "when separation would be in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."

Procedure

Carmona v. Toledo, 215 F.3d 124 (1st Cir. 2000)

Two unidentified police officers pursued a robbery suspect into plaintiff's neighborhood after being tracked with transponders fashioned to look like currency bills. The officers allegedly forced entry into plaintiff's apartment holding her and her daughter at gunpoint for approximately 25 minutes while searching their home. The court discusses the defendants' failure to provide properly authenticated documents with their summary judgment motion. The court also discussed whether or not the plaintiff should be allowed to conduct discovery prior to summary judgment. In this case they found the plaintiff should have been allowed some reasonable discovery.

…where, as here, plaintiff's case turns so largely on their ability to secure evidence within the possession of defendants, courts should not render summary judgment because of gaps in a plaintiff's proof without first determining the plaintiff has had a fair chance to obtain necessary and available evidence from the other party.

Procedure

Moore v. City of Harriman, 218 F.3d 551 (6th Cir. 2000)

In an excessive use of force case the defendants filed a motion to dismiss for failure to state a claim, as plaintiff did not expressly state that the officers were being sued in their individual capacities. The court found that it is not necessary to specifically allege the defendants were acting in their individual capacities if the language in the complaint gives sufficient notice that they are being sued individually. In this case, the complaint alleged that the officers were acting for themselves when they instituted criminal charges to shield and cover up the wrongful actions of the defendants, and that they were acting outside of the scope of their employment and in bad faith.

Pursuit

Feist v. Simonson, 222 F.3d 455 (8th Cir. 2000)

Simonson pursued a suspected stolen vehicle at high speeds for over 6 miles, 1.2 of which was in the wrong direction down an interstate. The suspect vehicle struck plaintiff's vehicle at a closing speed of between 97 and 104 MPH killing the plaintiff. Simonson had a history of engaging in high-speed pursuits. The court found that reasonable officers would know or should know as a matter of law that engaging in such a pursuit violated the 14th Amendment. The court further found that although the decision to pursue may have been reasonable given the length of time and the officer's knowledge of the risks, his decision to continue the pursuit would be evaluated under the deliberate indifference test.

First Amendment

Gabriel v. City of Plano, 202 F.3d 741 (5th Cir. 2000)

School officials complained to police that abortion demonstrators at their high school were making it difficult to get students off the school buses and into school. Responding officers who had dealt with these demonstrators on prior occasions asked Plaintiff Gabriel to put down his sign. He refused (there is a dispute as to whether he swung the sign at the officer's head) at which time Officer Hunt grasped Gabriel's wrist and Gabriel dropped to the ground releasing his sign. Gabriel was then told to leave as he was disrupting classes in violation of the Texas Education Code. Officer Hunt did not arrest or issue Gabriel a citation. Gabriel sued and among other claims, alleged a violation of First Amendment rights of free speech and religion and unreasonable use of force. Specifically, Gabriel claimed the City failed to train its police officers in the Texas Education Code, property boundaries of the high school and First Amendment rights.

To prevail in a failure to train claim, the plaintiff must prove either that the Municipality deliberately or consciously chose not to train its officers despite being on notice that its current training regimen had failed to prevent tortuous conduct by it's officers or, under the "single incident exception," that the possibility of recurring situations presented an obvious potential for violation of constitutional rights and the need for additional or different police training.

First Amendment

Lucas v. Monroe County, 203 F.3d 964 (6th Cir. 2000)

Tow operator sued the Sheriff claiming that the Sheriff violated his First Amendment rights when he retaliated against him for his public criticism of the Sheriff's policies and practices. To prevail on a retaliation claim, plaintiff must establish that (1) he was engaged in constitutionally protected conduct; (2) that defendant's adverse action caused him to suffer an injury which would likely chill a person of ordinary firmness from continuing to engage in that conduct; and (3) that the adverse action was motivated at least in part as a response to the exercise of his constitutional rights.

The plaintiff in this case accused the Sheriff of favoritism, lack of competition and unfairness in administration of the tow list, and that he rewarded political supporters at the expense of other tow companies. "Freedom to criticize public officials and expose their wrongdoing is at the core of First Amendment values, even if the conduct is motivated by personal pique or resentment." The Sheriff's removing plaintiffs from the stand-by tow list ending their opportunity to receive business through dispatch was an adverse action which would deter a person of ordinary firmness from continuing to engage in criticizing the Sheriff. Finally, the Sheriff's letter informing plaintiffs that they were being removed because plaintiff voiced his complaints publicly showed that the adverse action was motivated by their constitutionally protected public criticism of the Sheriff's Department.

First Amendment

Thomsen v. Romeis, 1998 F.3d 1022 (7th Cir. 1999)

From 1986 to February 1994 Thomsen had never received a negative comment regarding his work. In February, 1994, Thomsen and three other officers filed a request for an investigation alleging misconduct on the part of two detectives and the chief for failing to take corrective action regarding the misconduct. The alleged misconduct included improper handling of seized monies, using drug informants on parole, (contrary to Department of Correction policies), and a claim that one of the officers allegedly used his service revolver to threaten to kill an individual for following his girlfriend. Four days after Thomsen's complaint he received a letter of counseling for not updating his operations manual. This was followed by a written warning for failing to follow seniority orders filling a sick leave vacancy and an oral reprimand for reporting to court wearing a short-sleeved shirt. He does not dispute that these acts occurred. In June of 1994 he learned that he re-aggravated a shoulder injury and would not be able to perform all of the duties of a patrol officer. In July he submitted a disability retirement application and a request to work light duty until the application could be processed, at which time he would submit his resignation. The chief determined that there was no light duty assignment available and he was not willing to reassign Thomsen to the detective division or court officer position as an accommodation. Instead the chief decided to terminate Thomsen once he had exhausted his vacation and sick leave time. Thomsen claims first amendment retaliation. It is undisputed that his speech and reporting official acts of misconduct were protected. He was, however, unable to present evidence demonstrating that his filing of the complaint motivated the defendants to take adverse action against him. He admitted to the first three incidents and there was a question as to whether or not the chief's action was significant enough to create the potential for chilling an employee's speech. To be considered materially adverse the change of circumstances of employment must be more than a mere inconvenience or an alteration of job responsibilities, and it certainly must be adverse in the sense that the employee is made worse off by it.

A plaintiff cannot prevail on a retaliatory discharge claim if the decision to terminate would have been reasonable even in the absence of the protected conduct. In this matter, Thomsen admitted that continuing to serve with his disability would have been unsafe. He contended

that the defendants would have attempted to accommodate him by reassignment if it had not been for his complaint. However, employers are not required to bump other employees from occupied positions in order to reasonably accommodate disabled employees under ADA. This claim failed because plaintiff was unable to produce evidence that he would not have been terminated in the absence of his protected conduct.

Equal Protection

Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir. 2000)

Eyrle Stuart Hilton IV sued for injunctive relief and damages alleging violations of his constitutional rights to petition the government for redress of grievances and denial of equal protection. Hilton had been feuding with his neighbors in a blue-collar apartment complex for seven years. Police were called approximately 80 times over that period and cited or arrested Hilton 15 times for such things as disorderly conduct, battery, and violation of noise ordinances. Only once was a neighbor cited for allowing his dog to bark loudly. Hilton's argument was that the police had not been even-handed in arbitrating the feud and enforced the law one-sidedly.

The right to petition the government for redress of grievances is found in the First Amendment. The right has never been understood to be a right to police assistance. As the Supreme Court held in DeShaney v. Winnebago, the Constitution is a charter of negative liberties. It creates areas in which the government has to let people alone; it does not entitle them to demand services, such as police protection. The Court further noted that it is not a feasible undertaking for the federal courts to direct the allocation of public resources to particular public services.

The equal protection clause is concerned with equal treatment rather than establishing entitlements to minimum government services. It does not entitle a person to adequate, or indeed, any, police protection. Selective withdrawal of police protection, however, may amount to an equal protection claim. The Court noted that Hilton and his neighbors were all white, therefore he was unable to show that he was discriminated against because of his race, religion, gender or some other attribute that describes a group traditionally protected by the equal protection clause. The recent Supreme Court decision of Olech v. Village of Willowbrook, 20 S.Ct. 1073 (2000) recognized that a person doesn't have to be a member of a protected group to invoke the equal protection clause. If the police decided to withdraw all protection from Hilton out of shear malice, or because his neighbors had bribed them, he would state a claim under Olech. In this case, Hilton did not have any evidence of improper motive. It is unknown why the police exercised their broad discretion in favor of the neighbors. It could have been because the neighbors were always right, because the police were inept, or because the neighbors may have deceived them. In the "Class of One" equal protection cases; to make out a prima facia case, the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature, unrelated to the duties of the defendant's position. The Court further

described Olech type cases as "vindictive action" cases that require proof that the cause of the differential treatment was a totally illegitimate animus toward the plaintiff.

HIV Disclosure

Herring v. Keenan, 218 F.3d 1171 (10th Cir. 2000)

A probation officer, in violation of department policy, disclosed that plaintiff was HIV positive to his sister and two of plaintiff's supervisors at the restaurant where he was employed. After discussing the right to privacy and the nondisclosure of personal information enunciated in Whalen v. Roe, 429 US 589 (1997) and a number of other privacy cases, the court still held that in 1993 a reasonable probation officer could not be presumed to know whether unlimited disclosure of a probationer's HIV status would violate the probationer's constitutional rights.

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